DEFENDANT'S RIGHT TO BE PRESENT — DEFENDANT MAY WAIVE RIGHT TO BE PRESENT AT ANY STAGE OF THE PROCEEDINGS, EXCEPT SENTENCING ……Revised 2/2010

Under Rule 9.1, Ariz. R. Crim. P., a defendant may make a voluntary waiver of his right to be present at any stage of the criminal proceedings, other than sentencing.[1] Rule 9.1 provides:

> Except as provided in these rules, a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it. The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear.

The key to finding that the defendant has waived his presence is voluntariness. In every case, the trial court should make certain that the defendant's absence is in fact voluntary before proceeding in the defendant's absence. As the Arizona Supreme Court noted in *State v. McCrimmon,* 187 Ariz. 169, 171, 927 P.2d 1298, 1300 (1996), "proceedings in criminal cases held outside the defendant's presence are fraught with danger and should be conducted, if at all, only for valid reasons and only where the record clearly shows that the defendant has waived his right to be present."

To waive his right to be present, the defendant must actually have a choice. As the Arizona Supreme Court explained in *State v. Garcia-Contreras*, 191 Ariz. 144, 147, ¶ 11, 953 P.2d 536, 539 (1998), "Voluntary choice presupposes meaningful alternatives. Put another way, a voluntary waiver of the right to be present requires true freedom of

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[1] Rule 26.9, Ariz. R. Crim. P., requires the defendant to be present at sentencing. When a defendant voluntarily absents himself at the time of sentencing, the trial court must postpone imposition of sentence until the defendant can be present. *State v. Fettis,* 136 Ariz. 58, 664 P.2d 208 (1983).

choice." In *Garcia-Contreras*, the defendant's civilian clothes had not arrived when jury selection was scheduled to begin, and the trial judge refused to grant a continuance. The defendant chose not to appear before the panel in jail clothes. The Arizona Supreme Court held that the defendant's absence was not voluntary because he had no real choice, and reversed his conviction.

The "inference" language in Rule 9.1 means that once the trial court finds that the defendant had the required notice, the court can presume that the defendant's absence is voluntary. However, this presumption is rebuttable, with the burden on the defendant to establish facts showing that his absence was not voluntary. *State v. Reed*, 196 Ariz. 37, 39, ¶ 3, 992 P.2d 1132, 1134 (App. 1999); *State v. Sainz*, 186 Ariz. 470, 473, 924 P.2d 474, 477 (App. 1996).

A defendant may waive his right to be present expressly, by informing the court or counsel that he does not want to be present, or implicitly by conduct, such as voluntarily failing to appear for trial. In *Reed*, *supra*, the trial court correctly found that the defendant's attempted suicide during trial constituted a voluntary absence, after receiving a doctor's testimony that the defendant made a rational decision to abort his trial by killing himself. *Reed* at ¶4. A defendant may simply choose not to attend all or part of a proceeding. *See State v. Bible*, 175 Ariz. 549, 571, 858 P.2d 1152, 1173 (1993), in which the defendant was given the opportunity to remain in court during voir dire but chose to leave. Or a defendant may leave the jurisdiction knowing that a criminal proceeding is pending against him. *See, e.g., State v. Tacon*, 107 Ariz. 353, 488 P.2d 973 (1971). In *State ex rel. Thomas v. Blakey*, 211 Ariz. 124**, 127, ¶ 12**, 118 P.3d 639**, 642** (App. 2005), an undocumented alien who requested voluntary departure

from the INS was found to have voluntarily absented himself from trial. A defendant may also escape from custody, thereby preventing the State and his own counsel from providing him with information as to trial proceedings. *See State ex rel. Romley v. Superior Court*, 183 Ariz. 139, 901 P.2d 1169 (App. 1995).

In *State v. Dann*, 205 Ariz. 557, 74 P.3d 231 (2003), defendant complained on appeal that he had not been present during a series of pretrial telephonic conferences and a series of side-bar and in-chambers conferences during jury selection and trial. In addition to finding no prejudice, the court found that defendant waived the issue by failing to raise it when the absences occurred. A defendant may not "sit on his hands, fail to assert his desire to be present at an in-chambers discussion, then claim fundamental error based on his absence from that discussion." *Id.* at 575, 74 P.3d at 249.

A defendant may also forfeit his right to be present by disruptive behavior in the courtroom. As the Court of Appeals has said in the context of contempt of court, "The court has the right and the duty to protect all persons who are in attendance upon it from abuse while they are in or near the courtroom." *Hirschfeld v. Superior Court*, 184 Ariz. 208, 209, 908 P.2d 22, 23 (App. 1995). In *State v. Delvecchio*, 110 Ariz. 396, 400, 519 P.2d 1137, 1141 (1974), the Arizona Supreme Court said: "When a defendant insists upon disobeying the rules of the court, the judge may, among other measures, remove the defendant from the courtroom." The court in *Delvecchio* upheld the trial court's decision to prohibit the defendant from appearing in the courtroom when the verdicts were rendered. The judge may order that a defendant be shackled, and even gagged, before the jury when it is necessary to maintain order in the courtroom. *See*

State v. Watson, 114 Ariz. 1, 11, 559 P.2d 121, 131 (1976); *see also State v. Whalen*, 192 Ariz. 103, 106-107, 961 P.2d 1051, 1054-1055 (App. 1997), and cases cited therein. *But see State v. Gomez*, 211 Ariz. 494, 504, 123 P.3d 1131, 1141 (2005) (prohibiting routine shackling of defendants).

For a waiver to be valid, the defendant must be aware of the type of hearing at which he is waiving his appearance. In *State v. Bishop*, 139 Ariz. 567, 570, 679 P.2d 1054, 1057 (1984), the defendant was in jail and detention officers arrived to take him to court for a mental competency hearing under Rule 11, Ariz. R. Crim. P. The officers did not tell the defendant what kind of proceeding was to take place, and he told the officers that he was not going to go to court. The Arizona Supreme Court found the trial court abused its discretion in finding that the defendant voluntarily refused to attend the Rule 11 hearings, noting that "mere appearance by detention officers would not indicate to an accused the type of proceeding for which he was wanted." *Id*. The Court reasoned that the defendant could have thought that he was wanted for a proceeding, such as a motion for continuance, at which his presence was not essential. The Court also noted that because the defendant was in custody, the trial court could easily have brought the defendant to court to explain the nature of the proceedings. *Id*. at 571, 679 P.2d at 1058.

In *State v. Sainz*, 186 Ariz. 470, 924 P.2d 474 (App. 1996), the Court of Appeals found that a trial court proceeded properly in trying the defendant in absentia following the trial court's repeated warnings that the court would construe the defendant's continued tardiness to be a voluntary absence for trial purposes. *State v. Sainz*, 186 Ariz. 470, 472, 924 P.2d 474, 476 (App. 1996); *see also State v. Armenta*, 112 Ariz.

352, 541 P.2d 1154 (1975) (defendant's failure to appear following adjournment is grounds for proceeding in absentia). Note, however, that a defendant who is in custody outside the State is not necessarily "voluntarily absent" from trial, even if the defendant voluntarily violated the conditions of his release. *State v. Chavez-Inzunza,* 145 Ariz. 362, 365, 701 P.2d 858, 861 (App. 1985).

The defendant has a duty to keep himself apprised of the status of his case. "It is the responsibility of an out-of-custody defendant to remain in contact with his or her attorney and with the court." *State v. Love*, 147 Ariz. 567, 570, 711 P.2d 1240, 1243 (App. 1985). In *State v. Holm,* 195 Ariz. 42, 985 P.2d 527, 528 (App. 1998), *disapproved on other grounds by State v. Estrada*, 201 Ariz. 247, 34 P.3d 356 (2001), the defendant argued that he did not voluntarily waive his presence at trial because he was mistaken as to the trial date. The Court of Appeals rejected this argument, reasoning that if the defendant had met his obligation to maintain contact with his lawyer, he would have been aware of the actual trial date. "Having failed to do so, he cannot now argue that his decision to violate his conditions of release by absconding was not a voluntary waiver of the right to be present at his trial." *State v. Holm,* 195 Ariz. 42, 43, ¶ 4, 985 P.2d 527, 528 (App. 1998).

Similarly, in *State v. Muniz-Caudillo*, 185 Ariz. 261, 914 P.2d 1353 (App. 1996), the defendant was released in December 1991 after the court informed him that he had to attend the pretrial conference in February 1992. The defendant violated the terms of his release and failed to appear at the pretrial conference, and the court issued a bench warrant. The defendant was tried and convicted in absentia in August 1992. The defendant was arrested and sentenced in 1994. On appeal, he argued that while he left

voluntarily, it was unfair to hold the trial in his absence because he did not know when the trial was to begin. The Court of Appeals rejected that argument, noting that while the defendant was "technically without personal notice of his trial date," his absence was still voluntary because he failed to appear at any proceedings or keep in touch with his counsel. *Id*. at 262, 914 P.2d at 1354.

In *State ex rel. Romley v. Superior Court*, 183 Ariz. 139, 901 P.2d 1169 (App. 1995), the defendant was advised at his arraignment of the original trial date, informed of his right to be present at trial, and warned that the trial could proceed in his absence. Defense counsel then moved for and received a continuance. However, the defendant escaped from pretrial custody before learning that the trial date had been continued and did not appear for trial. The State moved to try the defendant in absentia; the defense opposed the trial, arguing that the defendant was not notified of the trial date. The Court of Appeals found that the fact of the defendant's escape "itself provided evidence of his intent not to appear at trial no matter when it was held. This supports an inference of voluntary absence from trial." *Id*. at 145, 901 P.2d at 1175. Thus, trial in absentia was appropriate.

Although a defendant has the right to waive his presence at trial, the trial court is not compelled to accept a defendant's waiver. In *State v. Mumford*, 136 Ariz. 465, 467, 666 P.2d 1074, 1076 (App. 1982), the defendant asked to waive his presence during a *Dessureault*[2] hearing because he did not want the witnesses to see him. Instead, the trial court required him to be present so the witnesses could identify him. The Court of

[2] *State v. Dessureault,* 104 Ariz. 380, 453 P.2d 951 (1969).

Appeals upheld the trial court's ruling, stating that although the defendant had a right to waive his presence, the trial court was not obliged to accept his waiver. Similarly, in *State v. Morse*, 127 Ariz. 25, 617 P.2d 1141 (1980), the trial court rejected the defendant's request to be absent during a hearing on his prior convictions. The Arizona Supreme Court upheld the trial court's ruling requiring the defendant to be present, noting, "requiring a defendant to be present at his trial and to identify himself if so required by the court is a long-established practice and in harmony with due process." *Id*. at 32, 617 P.2d at 1148.